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No. 73-567

In the

Supreme Court of the United States

OCTOBER TERM, 1973

WERNER STEIN,

Petitioner,

vs.

CITY OF NEW BERLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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In the

Supreme Court of the United States

October Term, 1973

No.

WERNER STEIN,

Petitioner,

vs.

CITY OF NEW BERLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The Petitioner, WERNER STEIN, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Wisconsin rendered in these proceedings on April 20, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (Appendix A, infra, pp. 1a - 8a) has not been officially reported in the bound volume of the Wisconsin Reports, but appears unofficially in its advance sheets at 58 Wis. 2d 417 and also in 206

N.W. 2d 207. The opinion of the Circuit Court (Appendix B, infra, pp. 9a - 18a) is unreported.

JURISDICTION

The judgment of the court below (Appendix C, infra, p. 19a) was entered on the 20th day of April, 1973. The petition for rehearing was denied on the 29th day of June, 1973 (Appendix C, infra, p. 20a). The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Petitioner maintains that the Wisconsin Supreme Court cannot extend the limitation of time prescribed in Section 62.23 (7) (da) of the 1957 Wisconsin Statutes and that to do so constitutes the deprivation of property without due process of law and the taking of property without compensation, all contrary to the 14th Amendment of the Constitution of the United States.

Section 62.23 (7) (h) of the 1957 Wisconsin Statutes further provides that nonconforming uses are preserved. When new zoning was enacted, nonconforming uses were permitted to continue. The Wisconsin Supreme Court in its decision apparently concedes that the "interim" law expired, but apparently inferred that Section 62.06(8), which is entitled "Existing Ordinances", in effect continues "ordinances". It says nothing about "zoning" per se. But nevertheless 62.06(8) was repealed August 12, 1959 and its recreated successor, Section 66.019, expressly exempts from the recreated "Existing Ordinance" statute the cities incorporated prior to August 12, 1959 as per Chapter

683 of the Laws of 1959. Respondent City of New Berlin was incorporated February 17, 1959 so there was no statute continuing the expired statute.

CONSTITUTIONAL PROVISIONS, STATUTES AND LAWS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Section 62.06 (8) of the 1957 Wisconsin Statutes which was repealed in 1959:

> "(8) Existing Ordinances. Ordinances in force in the territory or any part thereof, so far as not inconsistent with the provisions of chapter 62, shall continue in force until altered or repealed."

Section 62.23 (7) (da) of the 1957 Wisconsin Statutes:

> "(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance

but shall be effective for no longer than 2 years after its enactment (emphasis added)."

Section 62.23 (7) (h) of the 1957 Wisconsin Statutes:

"(h) Nonconforming uses. The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of the ordinance . . . ."

Chapter 261, Section 4, Laws of 1959, Published August 11, 1959:

"Section 4: 62.06 of the statutes is repealed."

Chapter 683, Laws of 1959, Published March 9, 1960:

"Chapter 261, laws of 1959, section 10 is repealed and recreated to read:
(Chapter 261, laws of 1959) Section 10. The provisions of chapter 261, laws of 1959, shall not apply to any incorporation, annexation or consolidation proceedings which were commenced prior to August 12, 1959, nor to any future proceedings to incorporate all or substantially all of the territory for which a certificate of incorporation was issued by the secre-

> tary of state prior to February 14, 1957, but which subsequently shall be declared invalid by a court."

STATEMENT OF THE CASE

In February, 1960, the Petitioner, WERNER STEIN, purchased the property in question located in the City of New Berlin. At that time almost all of the land was a useless, mosquito-infested swamp and the Petitioner immediately embarked upon a drainage and beautification program. As the operator of a salvage business, the Petitioner received resalable salvage as partial compensation for his services. Soon after acquiring the property he began filling the land and storing salvageable materials--reusable lumber, sinks, pipes, paneling and other retrievable items--on the land and in a barn on the property. He advertised openly in the area newspaper and offered people the opportunity to purchase reusable materials which would greatly add to the beauty of their homes and businesses.

On February 17, 1959, the City of New Berlin was incorporated and the land now owned by the Petitioner fell within the new city's confines. Shortly after incorporation, on May 29, 1959 the City enacted the critical ordinance which was clearly an "interim" ordinance, and entitled:

> "An ordinance to adopt and amend the zoning ordinance of the town of New Berlin as Interim zoning ordinance in the City of New Berlin, Waukesha County/Wisconsin" (emphasis added)

The zoning restrictions on the Petitioner's property remained unchanged, i.e., the property was zoned for agricultural use as it had been under the town of New Berlin zoning ordinances.

Pursuant to Section 62.23 (7) (da) of the Wisconsin Statutes of 1957, which statute was in full force and effect during the critical time periods involved, an "interim" ordinance could be effective for "no longer than 2 years after its enactment". Therefore, at the time of its enactment, Respondent's officials were placed on guard by the express wording of the statute that it would expire within two years, or on May 29, 1961, unless a more comprehensive zoning code was adopted before then. It was not.

The City of New Berlin apparently also believing the ordinances had been repealed, subsequently adopted new zoning ordinances on June 5, 1962, more that three years after the passage of the interim ordinance. Pursuant to Section 62.23 (7) (h) of the 1957 Wisconsin Statutes any pre-existing, nonconforming lawful use of land takes priority over a new zoning law. Thus, on the face of the facts it should be clear--the Petitioner by continuously engaging in his retrieval and resale business from 1960 through 1962 and afterwards, established a valid, nonconforming use when the zoning laws expired May 29, 1961. There was clearly no zoning until June 5, 1962. Petitioners operations were legal and proper.

Although the law and facts are clear, the court below fails to give legal effect to its State's zoning statutes. The court calls an "interim" zoning ordinance "intermediate" and partially dismisses the Respondent's action in adopting the "interim" ordinance by stating that such action was wholly unneces-

sary by virtue of Section 62.06(8) of the 1957 Wisconsin Statutes, which Petitioner contends is completely immaterial to the issues. This statute was repealed by Chapter 261, Laws of 1959.

Since the language of Section 62.06(8) is phrased in terms of an enabling statute, its termination meant that the ordinances in effect for the town of New Berlin could not continue in effect for the City of New Berlin without affirmative action on its part. It is true that the successor statute, Section 66.019(2) was almost identical to Section 62.06(8), but the effect of the new Section 66.019(2), also contained in Chapter 261, Laws of 1959, was expressly limited to "any incorporation, annexation or consolidation proceedings which were commenced prior to August 12, 1959" by Chapter 683 of the Laws of 1959. Clearly the Respondent was incorporated on February 17, 1959 or prior to August 12, 1959. The former ordinances were not continued and the City Respondent itself must have so concluded or it certainly would not have passed the "interim law".

As a second and alternative ground for not giving effect to Section 62.06(8), that section clearly states that it does not apply insofar as it is inconsistent with the provisions of Chapter 62. Section 62.23 of the 1957 Statutes clearly sets forth a procedure for zoning ordinances which includes the provision for public hearings in Section 62.23(7) (d). Obviously, Section 62.06(8) cannot apply specifically to zoning ordinances

since Chapter 62 of the Wisconsin Statutes sets up an exact procedure which should be followed and therefore could not be bypassed by mere operation of law pursuant to Section 62.06(8) as contended by Respondent.

Petitioner believes that public officials can be presumed to mean "interim" when they say "interim". Taxpayers have a right to believe that they will have a right to be heard at a public hearing when zoning destroying their business is being debated.

The court's interpretation only concedes that the property may be used for the stabling of horses, yet it is well-known and proven that commercial stabling facilities cannot be erected since there is no adequate way of installing a sewage system. The lower court's interpretation conflicts with the express words of the critical statutes and therefore can only constitute arbitrary and capricious action and a direct deprivation of the Petitioner's rights under the 14th Amendment of the Constitution of the United States. The improved property becomes absolutely worthless if the lower court's decision stands.

REASONS FOR GRANTING THE WRIT

Substantive due process may be roughly defined as the constitutional guaranty that no person shall be deprived of his life, liberty or property for arbitrary reasons. The control of the use of land for public purposes through the state's police power is manifested most significantly through zoning laws which must bear a reasonable relation to public health, safety, morals and general welfare in order to be sustained. Euclid v. Ambler Realty Co., 272 U.S. 365, 395; See also, e.g. State ex rel. Euverad v. Miller, 98 Ohio App. 283, 129 N.E. 2d 209 (1954).

In Eubank v. City of Richmond, 226 U.S. 137, this Court struck down a city zoning ordinance providing for a building line to be determined by adjoining property owners without recourse to any discernible, objective standard. Because of the wide discretionary power which the ordinance vested in a group of landowners over other landowners, the ordinance was held to constitute an unreasonable exercise of the State's police power.

The right to property encompasses certain constitutional elements such as the unrestricted right of use, enjoyment and disposal of the particular subject of property. Of these elements, the right of user is the most essential and critical.

When the Respondent's interim zoning ordinance expired, no valid zoning law existed and therefore Petitioner's business use of the land became a lawful nonconforming use.

As reference works disclose, this Court has decided only a few cases in the area of zoning ordinances and, as far as Petitioner's counsel is aware, this Court has never set forth a definitive opinion with respect to the legality of arbitrary state action in failing to give effect to a valid nonconforming use. Petitioner respectfully submits that this Court should delineate the law in this area at this point.

The arbitrary decision of the court below has worked a severe hardship upon the Petitioner. The land which is the subject matter of this action played an integral role in the establishment of a thriving business which employed up to 15 men. The lower court's decision reduces the property to a wasteland. The property has a barn with two horses in it, one of which was so lonesome a second horse was brought in to keep it company. Record 293. A barn cannot be connected to any type of sewage and the small barn has no sewage facility; nothing can be built on this acreage. Record 132-34. It is obvious that no commercial stable license can be granted without sewage facilities of some type and it is equally obvious that the property can have no other use.

The case at hand is closely analogous to the decision of the court in Allen v. City of Corpus Christi, 247 S.W.2d 130. This was an action by the city against Allen and others to restrain the defendants from continuing their business of conducting automobile salvage and wrecking yards at their present places of business. Although the lower court rendered judgment in favor of the city granting a permanent injunction, the appellate court reversed,

holding that the city could not pass an ordinance requiring a nonconforming business located in a light industrial district to move to a heavy industrial district or go out of business, where the nonconforming business was in existence before the city adopted any zoning ordinance. The court in its opinion stated:

> "All of these cases support the proposition that zoning ordinances operate prospectively, not retrospectively, and that existing nonconforming businesses in a zoning area must be permitted to continue to do business as they had existed prior to any zoning ordinance. Any attempt to eradicate such business is regarded as a misuse of the police power of a state and is unreasonable and unconstitutional as a taking of private property without compensation and without due process of law." 247 S.W.2d 130, 132-33.

Through failing to preserve Petitioner's nonconforming use the lower court raised a serious federal question which this Court has not as yet set forth a definitive statement. In view of the increased need for environmental and urban planning and the exigencies that municipalities will surely confront in the future in dealing with existing nonconforming uses, Petitioner respectfully requests this Court to grant certiorari so that this area of the law may be fully clarified.

If any property owner is to lose his life savings because of allegedly violating a law which does not exist, the Petitioner respectfully submits that such a person's rights become a nullity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX A

OPINION OF THE SUPREME COURT
(filed April 20, 1973)

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1972 Number 323

CITY OF NEW BERLIN,

Respondent,

vs.

WERNER STEIN,

Appellant.

APPENDIX A

OPINION OF THE SUPREME COURT
(filed April 20, 1973)

APPEAL from a judgment of the circuit court for Waukesha county: WILLIAM E. GRAMLING, Circuit Judge. Affirmed.

This is a suit by the City of New Berlin to perpetually restrain Werner Stein from accumulating junk, conducting a business of the resale of used lumber and other building materials, collecting and disposing of waste material, and operating a dump contrary to the city of New Berlin municipal code, which forbids such uses and makes them a public nuisance. The defense denies the allegations that the uses constitute a public nuisance or are contrary to municipal ordinances and affirmatively alleges his business of the sale of used and second-hand lumber is a lawful nonconforming use. Stein contends there was no valid ordinance regarding the use of his property from May 29, 1961, until the adoption of a zoning ordinance by the city of New Berlin on June 5, 1962, during which time he operated on his premises a business of selling used building materials.

After a trial, the court concluded that as a matter of law because a 1959 ordinance was valid and continued in force until the adoption of the new ordinance by the city on June 5, 1962, Stein did not have a lawful nonconforming use of the premises, except for his limited use in renting out horse stables. The court also found that in any event, Stein's use of his land did not in fact amount to a

valid nonconforming use. From the judgment granting a permanent injunction, Stein appeals.

HALLOWS, C. J. The dispositive issue in this case is whether there was a valid ordinance during the period from May 29, 1961, to June 5, 1962, prohibiting the use of Stein's premises so that his alleged use during that period could not become a nonconforming use upon the adoption of the zoning ordinance by the city of New Berlin on June 5, 1962. We need not decide whether Stein's activity constitutes operating a junk yard or a dump or is restricted to the sale of used lumber and material. He claims what is junk and trash to some people is useable material, treasure trove or perhaps antiques to others. His evidence shows that during the critical years of 1960, 1961, and 1962, there was some activity consisting of the storage and sale of useable building material upon his land. The evidence of the city shows this was not noticeable to the public or to the neighbors until 1965 and thereafter when his activities were greatly accelerated.

The property in question involves approximately five acres, all but one acre of which is swamp land, which Stein acquired on April 1, 1960. Prior thereto, on February 17, 1959, the city of New Berlin was incorporated. Prior to its incorporation the property now owned by Stein was situated in the town of New Berlin, which had a zoning ordinance which zoned the land in question as agricultural. Shortly after the city of New Berlin was incorporated and on May 29, 1959, the city enacted the critical ordinance which is entitled, "An Ordinance to Adopt and Amend the Zoning Ordinance as an Interim Zoning Ordinance in the City of New Berlin."

Under this ordinance, the zoning and use restrictions on Stein's premises remained unchanged, i. e., permitted agricultural use which did not include Stein's alleged resale business.

Stein contends this is an interim ordinance which lapsed on May 29, 1961. The city argues the ordinance was valid until replaced in 1962. Stein bases his argument on sec. 62.23(7)(da), Stats. 1957.[1] This section, which was created by the Laws of 1957, ch. 65, was held by the trial court to be inapplicable and we think correctly so.

This section while entitled "Interim Zoning," became part of this state's general zoning laws of chapter 62 which contemplated a comprehensive zoning plan and zoning which would effectuate such a plan. Consequently, the language of this section referred to a common council of a city which had not adopted a zoning ordinance. The purpose of this section was to preserve existing uses, that is, to freeze them so the status quo remained pending the preparation and adoption of the comprehensive zoning plan. The life of

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[1] "62.23 City Planning.
(7) Zoning.
(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after enactment."

such a zoning ordinance was fixed by the statute at two years.

Upon incorporation, New Berlin acquired by operation of law the town's zoning ordinances which regulated the territory which became the city. As part of the law applicable to the incorporation of cities, sec. 62.06(8), Stats. of 1957,[2] provided that the ordinances in force, insofar as they were not inconsistent with the provisions of chapter 62, continued in force on the land which was situated within the newly incorporated city. Consequently, there was no need for the city of New Berlin to adopt an interim zoning ordinance under sec. 62.23(7)(da), Stats. 1957, in order to freeze the uses then being made of the property and to prevent new uses which might have been contrary to those provided in a contemplated comprehensive zoning ordinance.

The ordinance adopted by the city of New Berlin on May 23, 1959, did two things: It adopted the zoning ordinance of the town of New Berlin, which was unnecessary in view of sec. 62.06(8); and it amended those ordinances in some respects by adding new restrictions referring particularly to various classifications of residential districts.

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[2] "62.06 Incorporation.

. . .

(8) Existing ordinances. Ordinances in force in the territory or any part thereof so far as not inconsistent with the provisions of chapter 62, shall continue in force until altered or repealed."

Regardless of how it labelled the ordinance, the city of New Berlin could enact these restrictions, some of which were applicable to Stein's property. We think the use of the term "interim zoning ordinance" was erroneous because the resolution particularly provided that the ordinance would remain in full force and effect until changed, modified, or repealed by the city.

This language is contrary to the two-year limitation of sec. 62.23(7)(da), if the city had any intention it was exercising power granted to it under that section. The use of the word "interim" in the ordinance is not controlling. What the ordinance is called is not as important as its nature. See Edelbeck v. Town of Theresa (1973), 57 Wis. 2d 172, 203 N.W. 2d 694, rehearing, 000 N.W. 2d 000.

If, as Stein points out, this ordinance were passed pursuant to sec. 62.23(7)(da), Stats. 1957, it would be void because it did not preserve existing uses while a comprehensive zoning plan was being prepared, but rather adopted uses then in existence by virtue of a zoning ordinance and amended others.

The nature of sec. 62.23(7)(da) is that of a "stopgap." It allows an ordinance which is incidental to and in aid of a general comprehensive zoning plan. Since present uses are frozen and no new uses may validly be undertaken so as to acquire vested rights, it is reasonable that the statute limits such ordinances to two years. Without such legislation, landowners could make new uses of the unzoned property and acquire

rights which could not be divested by the forthcoming legislation. Such temporary legislation puts a stop to the "race of diligence." 2 Rathkopf, The Law of Zoning and Planning, p. 57-34, sec. 13 (3d ed. 1972). See also 1 Rathkopf, supra, p. 8-11, sec. 2; Comment, Stop-Gap and Interim Legislation, A Device to Maintain the Status Quo of an Area Pending the Adoption of a Comprehensive Zoning Ordinance or Amendment Thereto. 18 Syracuse L. Rev. 837 (1967). Although the term "interim zoning" is used in the statute as a title, it is plain from the language of sec. 62.23(7)(da) that what is meant is the freezing of existing uses and the preserving of the status quo. In the 1959 ordinance, status-quo uses were not frozen and the property could be put to new uses if within the applicable classification.

In the parlance of zoning, a "stopgap" ordinance neither reclassifies nor changes the zoning restrictions applicable to it. It merely freezes the right to make use of it as it is presently used for the duration of the period established by the stop-gap ordinance. 1 Ratkopf, supra, 1971 Cumulative Supplement, p. 145. A distinction should be made between such an ordinance and one which permits the reasonable use of land within classifications. The latter type constitutes an intermediate zoning scheme which anticipates the development of land thereunder in accordance with a zoning scheme or comprehensive plan then currently under study. If the interim plan is such as to prevent development of land, then it does not differ in its effect from a "stopgap" ordinance. 1 Rathkopf, supra, 1971 Cumulative Supplement, p. 145.

What the city of New Berlin adopted as a zoning ordinance on May 23, 1959, was an intermediate ordinance which validly existed until modified or changed on June 5, 1962. Consequently, its effect did not cease as Stein claims on May 29, 1961. Under the ordinance of 1962, which rezoned Stein's property from agricultural to residential and under a later ordinance adopted in 1969, there is no question Stein's use of his premises other than renting a stable for horses violated the zoning restrictions applicable to his land. Therefore the trial court was correct in entering the permanent injunction. We find no merit in the contention that the city's action to enjoin Stein's activities was barred by laches.

By the Court -- Judgment affirmed.

APPENDIX B

OPINIONS OF CIRCUIT COURT
(dated October 6, 1971 and November 4, 1971)

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

CITY OF NEW BERLIN,
a municipal corporation,

Plaintiff,

vs. Case No. 26779

WERNER STEIN,

Defendant.

APPENDIX B

OPINIONS OF CIRCUIT COURT
(dated October 6, 1971 and November 4, 1971)

The testimony in this case indicates that commencing sometime in the year 1965 the defendant began accumulating junk upon his premises. The situation worsened as time progressed, and in September of 1968 he was found guilty upon his plea of Nolo Contendere of accumulating junk and trash as shown by Exhibit #20- The County Court record in the case of New Berlin vs. Stein. Also offered in evidence were various photographs taken in 1970 and 1971, which conclusively show an accumulation of junk and debris on the premises, which is in violation of Section 10.06 of the New Berlin Municipal Code. The same evidence indicates the defendant to be continuously in violation of Section 11.05 of the New Berlin Municipal Code, which refers to the collection and disposal of waste material, which has been in effect since December 23, 1969. Prior to that date he was in violation of the provisions of former Section 5.05 of the New Berlin Municipal Code which was repealed in December of 1969. The evidence also indicates that the defendant was operating a dump without a permit in violation of the New Berlin Municipal Code. There is also conclusive evidence that the defendant has been engaged in the sale of used and second-hand lumber, which continues to the present time. The New Berlin Code prohibits the conducting of a business in this R-4 Residential District. The defendant himself not only corroborated but enlarged on the plaintiff's proofs by testifying he sold used and second-hand

lumber, that he engaged in the wrecking business, that he also engaged in the business of digging and removing peat moss and selling the same, and that he has on occasion rented horse stalls. The defendant admitted that he never received any permit of any kind to carry on any business whatsoever on the premises.

The defendant claims that his activities are justified in that they are a non-conforming use beginning in the year 1960 and running until the present date. The defendant purchased the premises in question in the month of April, 1960. Section 17.25 New Berlin Municpal Code reads as follows:

> "(1) EXISTING USE PERMITTED. The existing lawful use of a building or premises on June 5, 1962 or at the time of the enactment of any amendment to this Chapter may be continued although such use does not conform with the provisions of this Chapter for the district in which it is located, but such nonconforming use shall not be expanded."
>
> (This is a re-enactment of Sec. 12.02(r) (1) of prior Zoning ordinance in effect since June 5, 1962)

The question then becomes: Did the defendant have an "existing lawful use" of the premises on June 5, 1962? The City of New Berlin was incorporated in February of 1959. Consequently, as a

matter of law, immediately upon the incorporation, all of the ordinances in effect in the former Town of New Berlin went into effect in the New City of New Berlin WITHOUT ANY AFFIRMATIVE ACTION WHATSOEVER by the Common Council or Mayor of the new City.

See: Sec. 62.06(8) Wis. Stats. 1957, which remained in effect until August 11, 1959, and reads as follows:

> "(8) EXISTING ORDINANCES. Ordinances in force in the territory or any part thereof, so far as not inconsistent with the provisions of Chapter 62, shall continue in force until altered or repealed."

See also, Chapter 261 Laws of 1959 effective Aug. 11, 1959 enacting Sec. 66.019(2) which reads:

> "(2) EXISTING ORDINANCES. Ordinances in force in the territory incorporated or any part thereof, insofar as not inconsistent with chs. 61 and 62, shall continue in force until altered or repealed."

Exhibit #76, a certified copy of the Town of New Berlin Zoning Ordinance of November 3, 1947, with Amendments through August 28, 1950, was in force and effect at the time of the City's incorporation. This Zoning Ordinance continued in full force and effect as a matter of law until

altered or repealed. Pursuant to that Zoning Ordinance the premises in question were in an agricultural district and subject to the regulations set forth beginning at page 11 of the ordinance. The defendant's only use of the premises which qualified as a lawful use would fall under the category designated 'riding academies', since he apparently did rent out some stables to horse owners from time to time. The only other use he mentioned which might have been permitted was the removal and sale of peat moss, which might fall under the definition of 'quarrying'. However, for these uses to be lawful it would have to be submitted to and approved by the Plan Commission under the provisions of subsection 5 of section A of Section 6, Agricultural District, provided the location and plan of operation had been submitted to and approved by the Plan Commission after a public hearing. Admittedly, this was never done. After the incorporation of the City of New Berlin, the Town of New Berlin Zoning Ordinance was altered by the adoption of a Zoning Ordinance entitled "An Ordinance To Adopt And Amend The Zoning Ordinance Of The Town Of New Berlin As An Interim Zoning Ordinance In The City Of New Berlin, Waukesha County, Wisconsin". This is in evidence as Exhibit #5, and was adopted in May of 1959.

Defense counsel argues that the Interim Zoning Ordinance referred to above lapsed on or about May 29, 1961, pursuant to Sec. 62.23(7) Stats. That statute does not apply to the present situation in that it is meant to apply to a situation where

a City has no prior zoning laws, and the city council then takes peremptory action to 'freeze' existing uses while the necessary process of investigation is pursued, which finally results in a comprehensive zoning plan. Here the Town was completely zoned in districts, and a comprehensive zoning ordinance was in full force and effect. The Court concludes as a matter of law that at the time of the adoption of the Zoning Ordinance by the City on June 5, 1962, the defendant could not possibly have had any non-conforming lawful use of the premises, except for his limited use in renting out stables. Even if this were not true, the Court finds that the evidence of the defendant falls far short of establishing a valid non-conforming use. The photographs in evidence taken in the Fall of 1964 and the Winter of 1964-1965 show the defendant's land at that time appeared to be a grassy meadow land containing one horse shed or barn, and there was no evidence of any business operations nor any accumulation of junk or debris. These facts are corroborated by testimony. No business activity was noted until 1965 or 1966. Mr. Stein's own request for appeal, prepared for the Board of Appeals, described his land as follows:

> "Swamp land except for one acre, UNUSEABLE FOR ANYTHING ELSE"; and he therein states further:
>
> "I am in the process of improving and beautifying this land. When I first bought it, it was completely

> under water and entirely unusable. I have since put ditches around and drained it so that it is not a mosquito infested area. I have planted many fruit and lawn trees and bushes. I feel that a boarding stable would be an asset to this area."

This statement by the Steins confirms the testimony of plaintiff's witnesses that the only use Stein made of the property was the boarding of horses. In addition, Stein had no signs on the premises indicating he was carrying on business activities, and when asked about this he answered by saying his "business was private". McQuillin on Municipal Corporations says as follows:

> Vol. 8A, page 31, Sec. 25.187:
>
> "PUBLIC KNOWLEDGE of a nonconforming use of land and dwellings generally is requisite to its legal protection against zoning restrictions. That is to say, an existing nonconforming use means a certain utilization of the premises so that they may be known to the neighborhood as being employed for a given purpose, e.g. the conduct of a business."

Judgment may be entered in accordance with the demand of the complaint, including an injunction restraining the operation of the various additional

business operations the defendant presently engages in.

Dated this 6th day of October, 1971.

By The Court:

/s/ William E. Gramling
Circuit Judge

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

CITY OF NEW BERLIN,
a municipal corporation,

Plaintiff,

vs. Case No. 26779

WERNER STEIN,

Defendant.

The matter has already been tried, and a decision rendered by the Court. Several matters in the proposed bill of costs are at issue, together with the amount of bond in the event the Court should see fit to grant the defendant's request for a stay of execution pending appeal.

The plaintiff asks first for a refund of $100.00 which was paid by the City to the defense attorney pursuant to the Court order of April 27, 1971. This amount will not be refunded. The order provided that the City was to give to the defendant's attorneys copies of the ordinances relied upon in the complaint. The Court in its decision said: "The question then becomes: 'did the defendant have an existing lawful use of the premises on June 5, 1962?' " To determine this question it was necessary that the Court examine the ordinances in effect in 1959. In fact this very legal issue would probably be presented to the Supreme Court on appeal. These ordinances were proper and not submitted, therefore the sum of $100.00 will not be refunded.

The second matter at issue is the cost of $103.28 for photo-copies of the ordinances delivered to the defendant's attorney in accordance with the Court order of October 27, 1970. It is true that the Court ordered that photocopies be made, and that the reasonable amount thereof be paid by the defendant. This Court isn't sure who was more surprised when the figure of $103.28 was presented, the Court, defense counsel or plaintiff's counsel. The Court doesn't know what defendant's counsel thought the bill might be, but the Court certainly thought that $125.00 would be the maximum amount of money involved. The Court feels the amount requested is unreasonable, and will order that the defendant pay to the City the sum of $25.00 in lieu thereof. The situation is much comparable to someone coming to the Clerk of this Court's office and

asking for a certified copy of a document. The Clerk doesn't charge for the time involved in checking the index cards and securing the file, which is exactly what was done in this case. The Court considers it unreasonable.

The Court will grant a stay of execution pending appeal, and set the bond in the amount of $6,000.00. The evidence submitted by the City is that filling the ditch around the log would cost $6,000, and covering the material in place would cost $5,400.00. The Court sees no reason why it should consider the price of $36,000.00 for removal of the rubbish.

Dated this 4th day of November, 1971.

By The Court:

/s/ William E. Gramling
Circuit Judge

APPENDIX C

JUDGMENTS BELOW

(1) Supreme Court Judgment (filed April 20, 1973)

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1972 Number 323

CITY OF NEW BERLIN,

Respondent,

vs.

WERNER STEIN,

Appellant.

This cause came on to be decided on appeal from the judgment of the Circuit Court for Waukesha County and was briefed by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the Circuit Court for Waukesha County appealed from in this cause be, and the same is hereby, affirmed.

(2) Judgment on Petition for Rehearing
(Denied on June 29, 1973)

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1972 Number 323

CITY OF NEW BERLIN,

Respondent,

vs.

WERNER STEIN,

Appellant.

The Court now being sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.

(3) Circuit Court Judgment
(Dated October 19, 1971)

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

CITY OF NEW BERLIN,
a municipal corporation,

Plaintiff, JUDGMENT

vs. Case No. 26779

WERNER STEIN,

Defendant.

The above entitled cause having come on for trial and having been tried by the Court, Honorable William E. Gramling, Circuit Judge presiding, without jury, on April 12, 1971, and again on April 27, 1971, and with final day of trial on August 30, 1971; and, the Court having heretofore made and filed its Findings of Fact and Conclusions of Law wherein judgment is directed to be entered as follows:

NOW, THEREFORE, on motion of A. Warren Cahill, Assistant City Attorney for the plaintiff City of New Berlin,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. That the premises hereinafter referred to in this Judgment has reference to the following described real estate having the address of 5800 South Frances Avenue, New Berlin, Wisconsin, and legally described as follows, to-wit:

> Lots 11, 12 and 13 of Kelly Subdivision No. 2 being a subdivision in the northeast one-quarter of Section 36, Town 6 North, Range 20 East, City of New Berlin, Waukesha County, Wisconsin. Also part of the northeast one-quarter of Section 6, commencing 954.99 feet west of the northeast corner; thence south 2°53' E. at 1,226.20 feet; thence south 5°19'25" E. 101.94 feet to the place of beginning; thence S 11°0'55" E. 135.79 feet; thence S 14°16' E. 133.17 feet S 8°11'35" E. 44.79 feet; thence N. 89°40' W. 542.86 feet; thence N 0°50' E. 304.93 feet; thence S. 89°50' E. 473.15 feet to the place of beginning.

2. That the defendant, Werner Stein, is perpetually enjoined from using any portion of said premises for any business uses except the boarding of horses, which use he shall not enlarge upon.

3. That the defendant, Werner Stein, is hereby ordered and directed to forthwith clean up said premises by immediately removing therefrom:

(a) All disassembled, unoperable, junked or wrecked motor vehicles or parts thereof; and,

(b) All "junk" as defined in Section 10.06(3)(a), Municipal Code of New Berlin, Wisconsin, stating as follows:

" 'JUNK' shall mean old iron, chain, brass, copper, tin, lead other base metals, trailers, farm machinery, and equipment or any parts thereof to be junked or demolished, taken apart or destroyed for salvage materials, paper, waste paper, used lumber or building material, paper clippings, rags, rubber, glass or bottles, and all articles and things discarded as manufactured articles composed of or consisting of any one or more of the articles mentioned, including industrial metal or scrap or other material commonly included within the term 'JUNK'."

(c) All "trash" as defined in Section 10.06(3)(b), and in Section 11.06(1)(a) of the Municipal Code of New Berlin, Wisconsin, stating as follows:

Section 10.06(3)(b): " 'TRASH' means any rubbish, ashes, paper, dirt, discarded stones or bricks, tin cans, boxes, barrels, discarded wood and lumber, brush and any form of discarded vegetation, foundry sand

and industrial waste of any kind or description."

and

Section 11.06(1)(a): "(a) 'TRASH' means any rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels or similar substances, oil kerosene, benzine, or other similar oil or oily substance, or liquid; metal and discarded portions of motor vehicles and other junk; wood, brush and any form of discarded vegetation; foundry sand and industrial waste.

(d) All "garbage" as defined in Section 11.06 (1)(b), Municipal Code of New Berlin, Wisconsin, stating as follows:

" 'GARBAGE' means any dead carcasses, carrion, meat, fish, entrails, slops, dirty water or other nauseous or unwholesome matter, discarded food or vegetable products either for human or animal consumption and any other form of meat, fish, fruit, vegetable or manufactured food, used or intended for use for human and animal consumption."

4. That the defendant, Werner Stein, is perpetually enjoined from using said premises in violation of the provisions of Section 10.06, Section 11.05, Section 11.06, and Section 17.33 of the Municipal Code of New Berlin, Wisconsin.

5. That this Judgment may be enforced by contempt proceedings and/or other appropriate

remedies upon application to the Court.

That costs are taxed and allowed in the amount of $280.00.*

Dated Oct. 19, 1971.

/s/ William E. Gramling
William E. Gramling, Judge
of Circuit Court,
Waukesha County, Wisconsin

*Costs taxed by Court.
on Nov. 5, 1971.

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No. 73-567

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

WERNER STEIN,

Petitioner,

vs.

CITY OF NEW BERLIN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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In the

Supreme Court of the United States

October Term, 1973

No.

WERNER STEIN,

Petitioner,

vs.

CITY OF NEW BERLIN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The respondent, CITY OF NEW BERLIN, prays that an order issue denying the Petition of WERNER STEIN for a writ of certiorari to review the opinion and judgment of the Supreme Court of the State of Wisconsin rendered in these proceedings on April 20th, 1973.

QUESTIONS PRESENTED

Petitioner maintains that the Wisconsin Supreme Court can not extend the limitation of time as set forth in Section 62.23(7) (da) of the 1957 Wisconsin Statutes. Respondent contends that Section 62.23(7) (da) of the 1957 Wisconsin Statutes does not apply to the instant matter, and that the decision of the Supreme Court of the State of Wisconsin is based upon sound State grounds. Respondent further submits that the interpretation of what particular statutes of a State mean and the extent to which any provisions may be limited or affected by other acts, are questions which are reviewable by the highest Court of the State of Wisconsin. The question in this matter is not a proper question for consideration by the Supreme Court of the United States.

STATUTES AND LAWS INVOLVED

Section 62.06 (8) of the 1957 Wisconsin Statutes which was repealed August 11, 1959:

> "(8) EXISTING ORDINANCES. Ordinances in force in the territory or any part thereof, so far as not inconsistent with the provisions of chapter 62, shall continue in force until altered or repealed."

Chapter 261, Laws of 1959, effective August 11, 1959 enacting *Section 66.019 (2) of the Wisconsin Statutes* which reads:

> "(2) EXISTING ORDINANCES. Ordinances in force in the territory incorporated, or any part thereof, insofar as not inconsistent with chs. 61 and 62, shall continue in force until altered or repealed."

Section 62.23 (7) (da) of the 1957 Wisconsin Statutes:

> "(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment."

Section 62.23 (7) (h) of the 1957 Wisconsin Statutes:

> **"(h) Nonconforming uses. The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of the ordinance . . ."**

STATEMENT OF THE CASE

On February 17th, 1959, the CITY OF NEW BERLIN was incorporated, the lands subsequently acquired by Petitioner being within the boundaries of the CITY. Prior to its incorporation, the area included in the CITY OF NEW BERLIN was known as the Town of New Berlin. Such Town had a zoning ordinance which zoned all of the lands acquired by WERNER STEIN "agricultural". Petitioner, Werner Stein, acquired lands in the CITY OF NEW BERLIN in April of 1960. On May 29th, 1959, the CITY OF NEW BERLIN enacted an ordinance entitled:

> "AN ORDINANCE TO ADOPT AND AMEND THE ZONING ORDINANCE OF THE TOWN OF NEW BERLIN AS INTERIM ZONING ORDINANCE IN THE CITY OF NEW BERLIN, WAUKESHA COUNTY, WISCONSIN".

Such ordinance was found by the Supreme Court of the State of Wisconsin to not be an "interim" ordinance as defined in Section 62.23(7) (da) of the 1957 Wisconsin Statutes. Had Section 62.23(7) (da) applied, it would have limited the existence of the intermediate New Berlin ordinance to a period of two (2) years. Under the May 29th, 1959 CITY OF NEW BERLIN ordinance, the zoning and use of the lands which petitioner subsequently acquired remained unchanged, "agricultural". Petitioner argues that the ordinance of May 29th 1959, was an "interim" ordinance pursuant to Section 62.23(7) (da) of the Wisconsin Statutes and therefore expired two (2) years after its enactment. Following this logic, petitioner argues that after the expiration of such ordinance, having been extinguished by Statute after two (2) years, the petitioner established a valid non-conforming use of his premises, prior to the adoption of the comprehensive zoning ordinance enacted by the CITY OF NEW BERLIN on June 5th, 1962.

REASONS FOR DENYING THE WRIT

The language of Section 62.23(7) (da) of the 1957 Wisconsin Statutes applies to ". . . any City which has not adopted a zoning ordinance. . .". Section 62.23(7) (da) of the 1957 Wisconsin Statutes was intended to apply to newly incorporated municipalities which as a Town did not have zoning ordinances. Such Statute has no application to the matter at hand, for the CITY OF NEW BERLIN had incorporated from a Town which had a zoning ordinance. Wisconsin State Law, Section 62.06 (8) until August 11th, 1959, and Wisconsin Statutes 62.019 (2) after August 11th, 1959, provided that a Town's zoning ordinances continued in force in a City which incorporated from a Town if the Town had zoning ordinances. No affirmative action on the part of the newly incorporated municipality was necessary under State law.

Section 62.23(7) (da) of the 1957 Wisconsin Statutes by its express language allowed the CITY to enact an "interim" ordinance without referring the matter to the plan commission. The procedure which the City utilized in the passage of the May 29th, 1959, ordinance was not the procedure which would have been utilized had the City desired to freeze existing uses while in the process of investigating a general zoning scheme. The May 29th, 1959, CITY OF NEW BERLIN Zoning Ordinance was enacted by the New Berlin Common Council upon the resolution of recommendations submitted to it by the Plan Commission. Such recommendation and resolution was not required by Section 62.23(7) (da) of the 1957 Wisconsin Statutes.

The last indication that the May 29, 1959, Zoning Ordinance of the CITY was not an interim ordinance is that it did not preserve existing uses. Rather, it adopted some uses in existence by virtue of the Town ordinance (as inherited by the CITY) and amended other uses. This is not permitted by Section 62.27(7) (da) of the 1957 Wisconsin Statutes.

The May 29th, 1959, CITY OF NEW BERLIN Zoning Ordinance, therefore, was not subject to the two year limitation upon the zoning ordinances passed under Section 62.23 (7) (da) of the 1957 Wisconsin Statutes. The ordinance dated May 29th, 1959, continued until superseded by enactment of the Comprehensive Zoning Ordinance dated June 5th, 1962. The uses to which the defendant put his land during the time that he purchased it up to the time this matter was initially considered by the Circuit Court of Waukesha County, was contrary to the Zoning Ordinances which existed except as to the renting of a stable for horses.

An additional state ground is present upon which the decision of the Trial Court and Supreme Court of the State of Wisconsin is based. The Trial Court (Branch I, Circuit Court for Waukesha County, Wisconsin, Honorable William E. Gramling, presiding) determined that the evidence of the Petitioner, WERNER STEIN, fell far short of establishing a valid nonconforming use. The Wisconsin Supreme Court approved the reasoning of the Trial Court indicating:

> "...there is no question Stein's use of his premises, other than renting a stable for horses, violated the zoning restrictions applicable to his land."

58 Wis. 2d 417, 423; See at Appendix to PETITION FOR WRIT OF CERTIORARI Page 8a.

The decision of the Trial Court and Wisconsin Supreme Court rests on adequate independent state grounds. The United States Supreme Court in such a situation should not review their decision. *Dixon v. Duffy,* Cal. 1951, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46. *Young v. Roger,* Ill.1949, 69 S.Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333.

As is demonstrated by both this BRIEF and the PETITION FOR WRIT OF CERTIORARI, in this matter the crux of the arguments originating from the respective parties is the interpretation of the Statutes of the State of Wisconsin, and the impact which such State Laws have upon other State Laws or the ordinances of the CITY OF NEW BERLIN. In such a situation as that at hand, the highest Court of the State of Wisconsin has the final word. *Musser v. State of Utah,* Utah 1948, 68 S.Ct. 397, 333 U.S. 95, 92 L.Ed. 562.

CONCLUSION

For the foregoing reasons, the PETITION FOR WRIT OF CERTIORARI to review the judgment and opinion of the Supreme Court of the State of Wisconsin should be denied.

Respectfully submitted,

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